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IN THE

Supreme Court of the United States

No. 619.

Term, 19 .

WILMINGTON TRUST COMPANY, a Banking Institution Organized and Existing Under the Laws of the State of Delaware, Executor Under the Last Will and Testament of RICHARD C. duPONT, Deceased,

v.

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, a Corporation of the State of New York.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

Wilmington Trust Company prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit, entered in the above-entitled case on September 21, 1949.

OPINIONS BELOW.

The opinions of the United States District Court for the District of Delaware are reported in 68 F. Supp. 83, and 76 F. Supp. 560 and appear in the Record at page 33a and page 118a (as amended, at page 127a). The opinion of the United States Court of Appeals for the Third Circuit is reported in 177 F. (2d) 404, and appears in the Record at page 135.

JURISDICTION.

The jurisdiction of this Court is invoked under 28 U. S. C. 1254.

STATUTE INVOLVED.

The Statute involved is Sec. 496 of the Revised Code of Delaware 1935, the pertinent part of which is:

"496. Sec. 35. STANDARD PROVISIONS REQUIRED:— • • • no policy of life insurance • • • shall be issued or delivered in this state • • • unless the same shall contain in substance the following provisions: • • •

(3) A provision that except as otherwise expressly provided by law, the policy shall constitute the entire

contract between the parties and shall be incontestable after it has been in force during the lifetime of the insured for a period of not more than two years from its date, except for non-payment of premiums and except for violations of the conditions of the policy relating to naval or military service in time of war and, at the option of the company, provisions relative to benefits in the event of total and permanent disability and provisions which grant additional insurance specifically against death by accident may also be excepted: * * *"

QUESTIONS PRESENTED.

1. Whether under the law of Delaware, in a case arising upon an insurance policy which contains an aviation exemption clause, the insurer is entitled, after the expiration of the contestable period, to contest the policy, upon the ground that the loss occurred through a risk which was exempted in the aviation clause.

2. Whether, under the law of Delaware, the parties to the insurance contract intended to exclude any war risk.

As will appear more fully from the statement of reasons for granting the writ, the following additional question is presented in connection with the determination of this petition for a writ of certiorari:

3. Whether this Court will review the decision of a Court of Appeals of an important question of state law, where there are no state decisions touching on the question, and therefore no conflict of decision, if it also appears that, by reason of special circumstances, resulting in part from the decision, future litigation involving the question will be concentrated in the federal courts, so that the state courts will have no opportunity to correct probable error in the decision.

STATEMENT.

On June 26, 1935, Richard duPont entered into two life insurance contracts with respondent, each in the face amount of $50,000.00 payable to his executor. He was at that time 24 years of age and had even then attained eminence in the field of glider aviation. Each policy contained the following provision:

> "Death as a result of operating or riding in any kind of aircraft, whether as a passenger or otherwise, except riding as a fare paying passenger in a licensed passenger aircraft provided by an incorporated passenger carrier and operated by a licensed pilot on a regular passenger route between definitely established airports, is a risk not assumed under this Policy and if the Insured shall die as a result, directly or indirectly, of such operating or riding in an aircraft the amount payable shall be limited to the reserve held at the date of death for the face amount of this policy and for any dividend additions. Any accumulated dividend deposits will be payable in addition to such reserve."

On April 20, 1943, the assured was designated by General H. H. Arnold, Commanding General, Army Air Forces, "Special Assistant to the Commanding General, Army Air Forces, in charge of the Army Air Forces Glider Program, to serve in a civilian capacity" (60a). A. A. F. Memorandum No. 20-3 dated April 19, 1943, created the Office of Special Assistant and outlined in detail the duties which put the assured, by the designation on the following day, in complete charge of the Air Forces Glider Program with directions to report to the Commanding General through the Chief of the Air Staff. The designee was given "the Authority of an Assistant Chief of Air Staff" (61a). In the pursuance of his functions and duties, a series of orders was issued to him which required him to travel extensively by air. One of those, that of 30 June, 1943, (83a) directed him to proceed to A. A. F. Headquarters, Algiers, North Africa, on temporary duty for approximately one hundred

eighty (180) days, in connection with duty requested by the Theater Commander (General Eisenhower). On September 11, 1943, he was killed as the result of riding as an observer in the testing, at March Field, California, of an army experimental transport glider. The court found that he was in the military service.[1] His technically civilian status was explained by General H. H. Arnold:

> "That clause,—'to serve in a civilian capacity'—, was inserted, in his case, primarily to expedite the program for which he, because of his special qualifications, had been made responsible, and because of the urgent relation of that program to the effectiveness of United States Army Air Forces combat operations. In civilian clothes, Mr. du Pont was automatically relieved of the necessity of channeling his activities through numerous subordinate military offices; as a civilian he could deal *direct* with the Office of the Commanding General, Army Air Forces. This meant an invaluable saving of time; and time, at that period, was crucially 'of the essence'. In this sense, then, his being in civilian clothes was truly a military expedient. Factually, he was as much a member of our military establishment as though he held a commission. He gave his life in military service as actually as any officer in uniform, in actual military combat." (113a)

The insurer did not see fit in the policies to take advantage of the war service exception to incontestability permitted by the statute. In fact, the only exception to incontestability which it claimed was for non-payment of premiums. Further, it voluntarily cut down the statutory contestable period from two years to one year (16a-20a).

The insurer denied liability except as to policy reserves and to dividend additions.

The policies were delivered in Delaware, and the law of Delaware applies (25a).

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1. "His status, it would appear, at the time of his death was clearly military, and again it is unreal to argue that he was not performing a military function at the time of his death." (123a)

SPECIFICATION OF ERRORS.

The Court of Appeals erred,—

(1) In holding that the insurer could defend on the ground that the loss was a risk exempted under the aviation clause, although that loss occurred after the passage of the statutory contestable period;

(2) In holding that the aviation exemption clause was intended to exempt a military aviation risk in war;

(3) In affirming the judgment of the District Court.

REASONS FOR GRANTING THE WRIT.

Something more than the usual situation in which a litigant deems himself aggrieved, and therefore seeks the writ of this Court, is involved in the present case.

As a result of the decisions below, law has been announced by Federal Courts as being the law of Delaware, under circumstances which make it unlikely almost to the point of impossibility, that the courts of the state will ever be given the opportunity to review the law thus announced for them, and, consequently, to correct it if they should be in disagreement with it.

When, as is the case in the first question presented,[2] the law announced as to the effect of the incontestable statute of Delaware, contravenes a rudimentary principle of law, and the State Courts, in the circumstances, are powerless to protect their jurisprudence, this Court should satisfy itself that the lower Federal Courts have correctly stated the law of Delaware.

The second question presented,[3] is of great public importance and the same circumstances as those mentioned regarding the first question will probably foreclose the state courts of Delaware from ever passing upon a question which is primarily theirs, viz: Was it the intention in the

2. Ante p. 2.
3. Ante p. 2.

thousands of insurance contracts made in time of peace, to which young men were parties, and in which aviation exclusion provisions were contained, that such exclusion was to apply in war, where the voice of command or of duty constantly required assureds to undertake the excluded risk? The special circumstances disclosed in the record here emphasize the lack of any such intention.

The case is in the Federal Courts by reason of diversity, and those courts were consequently in the obligation of adjudging it in accordance with the Law of Delaware. Both courts found, correctly, we believe, that there was no applicable state law, and that they were in the necessity of ascertaining what, in their opinion, the state courts would determine the law of Delaware to be.

It should be pointed out, however, that the case is not in the Federal tribunals upon the diversity ground through the selection by petitioner of the Federal Forum—a selection which was open to it—but via the removal route. The right to remove exercised by the insurer was, of course, available to it under Federal statute. It considered the Federal Forum as more advantageous to it than the State one. Although, in disposing of the case, the courts below were in the obligation of doing so in accordance with state law, and although, as the opinions show, not one fact was in dispute, nor could be inherently, in the case presented, the insurer preferred to have a Federal Court determine the law of the State than to have it determined by the State's own courts.

There is a practical situation which results from the decisions below which will, we think, when appreciated by this court, make it especially solicitous to be assured that the law which has been announced for the State of Delaware by the Federal Courts is correct, and certainly that those decisions do not foist upon the state jurisprudence the violation of an elementary legal principle. The practical situation is that there is an improbability, approaching even to the point of impossibility, that the issues presented in this case should, because of the decisions below,

ever be presented to the State Tribunals. There is but one life insurance company organized under the laws of Delaware, Continental American Life Insurance Company.[4] The history of Continental American, thus far, at any rate, includes no case in the Delaware reports upon a death claim. Its record has not been litigious. It is reasonable to suppose that in the case of small policies under the jurisdictional amount for removal, companies would not wish to risk in the state courts a decision different from that rendered by the Federal courts in the present case, and would, therefore, pay or settle such small claims.[5]

Cases bordering somewhat on the fantastical could be imagined, such as a suit by a nonresident plaintiff against a nonresident insurer. Certainly such a suit could hardly be expected to be brought in Delaware while the decision in the present case remains unreversed. It is fairly clear, therefore, that as a practical matter, the issues of this case will not be raised in State Court litigation in Delaware, and it is not too much to say that this will be so for all time, or, in any event, so long as the Statutes governing removal remain unchanged.

This Court has, on more than one occasion, undertaken to review decision of a purely federal question—where the Federal Courts are under a less exacting responsibility—absent the conflict usually required, upon a showing that because of special circumstances a conflict was unlikely to arise so that adherence to its usual practice would leave

4. In the submission of the case counsel for the insurance company, without objection on the part of beneficiary, handed to the Court, as a reference book, the standard life insurance manual, known as the Handy Guide. Only one company, of 107 listed, is incorporated in Delaware.

5. A case recently decided here presents substantially this situation, King v. Order of Travelers, 333 U. S. 153, 156, (1948), where an insurer, did not appeal from a decision of the Court of Common Pleas for Spartanburg County, South Carolina, given in favor of the beneficiary on a $2500.00 policy. At the time a suit upon another policy in favor of the same beneficiary, against a different defendant, upon what appears to have been the precise issue, was pending in the Federal court. Whatever the reason, the defendant did not appeal from the judgment of the Court of Common Pleas, but an inference is permissible that it did not wish to risk an affirmance in the Supreme Court of South Carolina, for fear of the effect that this might have, either in the suit against the other defendant in the Federal Court, or upon other interests of the defendant in the Common Pleas action.

the error (if such there were) in the decision below forever uncorrected.

Thus in *Paramount Publix Corporation v. American Tri-Ergon Corporation,* (294 U. S. 464, 1935), this Court, on rehearing, granted certiorari (after first denying it for lack of a conflict in decision) when it was made to appear that future litigation upon the question would, for practical reasons, in all probability be concentrated in the same circuit.

When the same situation recurred, in *Schriber-Schroth Co. v. Cleveland Trust Co.,* (305 U. S. 47, 1938), and again in *Muncie Gear Co. v. Outboard Co.,* (315 U. S. 759, 1942), this Court again granted certiorari, although no conflict in decision had arisen, to prevent a possibly erroneous decision from becoming embedded in the Federal jurisprudence.

The removal statute lays upon the Federal Courts a heavy responsibility to decide correctly questions of state law upon which the state courts have not spoken, even in the ordinary situation where the state courts will have ample opportunity in later cases to correct an erroneous decision. In a case such as this, where the removal statute will almost certainly deprive the State of Delaware of all opportunity through its own courts to purge its law of the error in the decision below, that responsibility would seem still heavier, and the occasion most apt for the exercise by this Court of its power of review.

The questions, review of which is sought, are two—the first,—under the Delaware Incontestable Statute;[6] the second,—the interpretation by the Courts below, sitting as Delaware Courts, of the policies and of their aviation clause to exempt war aviation from coverage.[7]

It will be convenient to consider these questions, and the grounds on which their decision below is claimed to be erroneous, under separate headings.

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6. Ante p. 2.
7. Ante p. 2.

The Incontestable Question.

The case for the petitioner rests upon the simple and universally recognized principle that the mention in a statute of one thing implies the exclusion of another thing. *Expressio unius est exclusio alterius* is the axiom which is used (59 C. J. 984). Thus the Delaware statute [8] which requires that an insurance policy issued in the State shall contain a provision that it shall be incontestable after two years

> "except for non-payment of premiums and except for violations of the conditions of the policy relating to naval or military service in time of war and, at the option of the company, provisions relative to benefits in the event of total and permanent disability and provisions which grant additional insurance specifically against death by accident may also be excepted; * * *"

is not susceptible, after the expiration of the contestable period, of contest on grounds other than those enumerated.

The Courts below attempted to avoid the application of the *expressio unius* principle upon the authority of *Metropolitan Insurance Co. v. Conway*, 252 N. Y. 449 (1930), 169 N. E. 642, whose holding was that a Statute which permitted stated exceptions to incontestability did not prevent an insurer from excluding specified risks, and that it was thus left free to exclude any risk which it desired. The insurer was merely prevented by the incontestable requirement of the Statute from attacking the *validity* of the policy. Consequently, according to *Metropolitan Insurance Co. v. Conway*, the insurer was not precluded from inserting an aviation exclusion provision in the New York standard policy which would be operable after the passage of the contestable period. Under this holding, only contests which attacked the validity of the policy were precluded, and the enumerated statutory exceptions which permitted

8. Ante p. 2.

contests had reference only to contests on the score of validity. Therefore, since the exemption of an aviation risk had nothing to do with the validity of the policy, the expression of several permitted grounds of contest on validity did not preclude an exclusion on the ground of coverage, i. e., did not prevent an insurer from excluding an aviation risk.

The facts of the *Conway* case were simple. A mandamus action was brought against the New York Superintendent of Insurance to compel him to permit the insertion in relator's policy of an aviation exclusion clause similar to the one in the policies in suit here. The New York Statute, as it then existed, was precisely the Delaware Statute which controls the present case. No exception in favor of an aviation exemption was provided in it. It permitted the same exceptions to incontestability as the Delaware Statute which governs here. These included an exception on the ground of war service. The Court seized upon this exception as the basis for its view that the Statute did not deny to the insurer the right to exempt an aviation risk from coverage. It held that as provisions were "not unusual" which avoided policies for war service, the legislature must have intended that the exceptions to incontestability which it put into the Statute were to be confined to those which related to *validity* of the policy, and that, therefore, the insurer was free to exclude any risk which it desired. If all exceptions to incontestability which the Statute permitted were directed to defenses which attacked the validity of the policy, and were not concerned with exclusion of risks, the effect of the *expressio unius* principle might be avoided, under an *ejusdem generis* argument, we suppose, if an aviation exclusion clause were to be inserted, since such a clause was directed to coverage, and not to the validity of the policy.

This distinction, and the decision of the Court below, which adopts it, accords ill with the broad social purpose of the incontestable statute (see pp. 15-18, *infra*), to assure

to the beneficiaries (who in most cases have lost a breadwinner) not a lawsuit, but the certainty of insurance protection free from all defenses except those enumerated in the statute. It gives to the phrasing of the policy of insurance a significance which is totally irrelevant to that purpose: if the defense is based upon a clause beginning with the magic words "provided however" the insured has the full protection of the statute, but if the magic word is "except", that protection is withdrawn.

It is difficult to believe that an insured, when he purchases his policy, or the legislature when it adopted the statute, had in mind such technical distinctions. As this Court has intimated in another connection (*Klein v. United States,* 283 U. S. 231 (1931)), it is not reasonable to attribute to legislators, framing a statute not concerned with the technical law of property, concern with such niceties of conveyancing.

Even if these considerations be ignored, the distinction would still seem unsound, since it assumes that the legislature must have attributed to insurers the desire to *void* policies merely because they did not wish to assume a war risk. In such a case, it is reasonable to suppose that they would have excluded that risk from coverage; and this, it would seem, would be the reasonable view of the legislature which framed the Statute. The legislature would thus have reasonably considered, when it excepted from incontestability nonpayment of premiums, war service, disability matters, and double indemnity matters, that it had provided, after the passage of the contestable period, *incontestability* as to all other matters. Upon the basis of this reasonable view, there is no ground in principle for any difference between war service and aviation, and thus when a statute permitted an exception in favor of the one, the *expressio unius* principle should have operated to negative an exception in favor of the other.

In order to check upon the statement of the Court that war service provisions whose breach *invalidated* the policy

were "not unusual", we examined all of the cases dealing with these provisions which are contained in the second, third and fourth Decennials of the American Digest Series for the twenty-five years which preceded the decision in *Metropolitan Insurance Company v. Conway.* There was a total of 32 cases which dealt with the war service provision. Of these only 2 contained clauses which voided the policies; 29 involved mere exclusion from coverage, and the 32nd was of an uncommon character which was held void for indefiniteness. Thus, the premise on which the Court in the *Conway* case based its decision that the legislature considered a war service clause as one whose breach should void the policy, was, it is submitted, not only fundamentally unsound, but if it had gone further and examined the then recently decided cases, it would have learned that a war service clause which did other than exempt a risk was decidedly "unusual", and that thus, from a factual standpoint also, its view was wrong.

32 For the convenience of the Court we have listed the 32 cases in an addendum to this Petition, instead of swelling the Table of Cases ante by the addition of this large number.

Although other cases, which we concede represent the weight of authority, have followed *Metropolitan Insurance Co. v. Conway,* they have added nothing to it by way of reasoning, and the opinions in the Courts below, though citing some of them, rest their judgments squarely upon the authority of the *Conway* case. While, as we think we have shown, *Metropolitan Insurance Company v. Conway* is unsound in principle, and would not, we think, be followed by the Courts of Delaware when its unsoundness is pointed out, we are sure that the case would not be followed in the State Courts of Delaware when the extraordinary result which follows from the decision is shown.

Thirty-three of the states and the District of Columbia have in their insurance codes incontestable provisions of the same type as the Delaware one. Of these, the stat-

utes of 19 States are either exactly or substantially like that of Delaware, i. e., exceptions to incontestability are authorized for non-payment of premiums, for violations of conditions relating to war service, for provisions relative to disability benefits, and for provisions relating to double indemnity.

The other 14 States and the District of Columbia have authorized additional exceptions, chiefly in favor of aviation clauses of the general type of the one of the policies in suit. According to the decisions below, the omission in the Delaware Statute of the permission to an insurer to except an aviation risk from incontestability is of no moment, because incontestability as provided in the Statute is not concerned with a risk which the insurer is unwilling to assume. The absence of a statutory aviation exception to incontestability is without significance. But 14 States and the District of Columbia have *expressly excepted* aviation risks from the operation of their incontestable Statutes. As to these, clearly a clause of the type present in the policies in suit is operative after the passage of the contestable period. Thus, according to the decisions below, whether a State has expressly permitted insurers to except aviation risks from incontestability, or whether it has refused to permit such exception, the result is the same, and Statutes, plainly different, must be given precisely the same effect. This anomaly which results from the decisions below amounts, we submit, to a legal absurdity.[9]

The absurdity is emphasized by the fact that 7 of 14 states (and the District of Columbia) have amended their statutes for the express purpose of permitting an aviation exception to incontestability. The Statute of Delaware has not been amended. It is precisely the Statute of the 7

9. "We are not at liberty to construe any statute so as to deny effect to any part of its language. It is a cardinal rule of statutory construction that significance and effect shall, if possible, be accorded to every word. As early as in Bacon's Abridgment, sect. 2, it was said that 'a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void or insignificant.' This rule has been repeated innumerable times."

Market Co. v. Hoffman, 101 U. S. 112 (1879).

States and of the District of Columbia before they were amended for the sole purpose of permitting an aviation exception. The Courts below have necessarily held that these States and the District of Columbia have accomplished nothing whatever when they resorted to the serious process of amendment. To suggest that a State Court of Delaware would hold that its Statute, which requires a provision in a policy issued in the State that it

> "shall be incontestable after it has been in force during the lifetime of the insured for a period of not more than two years from its date, except for nonpayment of premiums, and except for violations of the conditions, if any, relating to naval or military service in time of war * * *",

has precisely the same effect as the Statute, e. g., of Ohio, which requires that a policy

> "shall be incontestable after it has been in force during the lifetime of the insured for a period of not more than two years from its date, except for nonpayment of premiums, and except for violations of the conditions, if any, relating to naval or military service in time of war *or to aeronautics* * * *"[10]

is beyond the conception of a Delaware practitioner, and we are clear that its courts would not so hold.[11]

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10. "or to aeronautics" was inserted by amendment.

11. "It will be presumed that the legislature, in adopting the amendment, intended to make some change in the existing law, and therefore, the courts will endeavor to give some effect to the amendment."

59 C. J. Sec. 647, p. 1097.

"* * * the presumption is that every amendment of a statute is made to effect some purpose, and effect must be given the amended law in a manner consistent with the amendment. The general rule is that a change in phraseology indicates persuasively, and raises a presumption that a departure from the old law was intended, and amendments are accordingly generally construed to effect a change."

50 Am. Jur. Sec. 275.

"The very fact that the prior act is amended demonstrates the intent to change the pre-existing law, and the presumption must be that it was intended to change the statute in all the particulars touching which we find a material change in the language used."

U. S. v. Bashaw, 50 F. 749, 8 C. C. A. (1892).

This argument was made to the courts below and the Petition for Rehearing in the Court of Appeals cites (150-1), the places where the argument appears in the briefs and in the transcript of the oral argument. The argument is not dealt with in the opinion of either court. The purpose of the Petition for Rehearing was, in large measure, to ask the court to give it specific consideration. The denial of the Petition for Rehearing in effect puts into the closed mouths of the Courts of Delaware a holding that Statutes, though different, are the same, and that Statutes expressly amended to secure a specific objective, have accomplished nothing through the use of the amending process.

For the convenience of the Court there is appended an Addendum listing and classifying States which have legislated incontestability. The appropriate excerpts from the Statutes are set out, and the amending language especially authorizing an exception to incontestability for an aviation risk is italicized.

This Court has at least once granted certiorari in a case which announced the principle underlying the enactment of incontestable statutes, *United States v. Patryas,* 303 U. S. 341, (1938) and in the opinion in that case this Court reaffirmed the statement of that principle announced in *Northwestern Mutual Life Ins. Co. v. Johnson,* 254 U. S. 96 (1920), which came here by certificate from the Eighth Circuit.

In the *Patryas* case the question was, whether the war risk policy of a veteran, which protected against disability and death, and which had been reinstated at a time when the veteran was physically disabled, entitled him to the disability protection of the policy. The Federal Incontestable Statute precluded contest

> "except for fraud, non-payment of premiums, or on the ground that the applicant was not a member of the military or naval forces of the United States. • • •"

It was held that the veteran was entitled to the disability benefits. The principle underlying the decision was thus stated by the Court:

> "A provision making a policy 'incontestable' except for certain clearly designated reasons, is wholly meaningless and ineffective if, after proof of the loss insured against, the policy can be contested upon grounds wholly different from those set out in the exception. The object of the provision is to assure the insured that payment on his policy will not be delayed by contests and lawsuits on grounds not saved by the exceptions."

This is the principle urged in behalf of petitioner in the present case, and the authority of the *Patryas* case was urged to the courts below. The sole reference to the case by the Court of Appeals is in a footnote (140) which says:

> "We can find no case which directly supports the plaintiff's view. United States v. Patryas, 303 U. S. 341, seemingly squints in the direction of the plaintiff in the instant case, but this favoring glance disappears when one bears in mind, as the learned District Judge aptly put it, 68 F. Supp. at p. 88, that 'In the Patryas case, the government was held to be contesting the policy of insurance because it was defending against a risk assumed by the terms of the contract, as the court construed the contract.' "

We doubt if the distinction suggested in the note between the *Patryas* case and the present one is sound; but this, it is submitted, is not the question, so far as the present case is concerned. We are not concerned with whether the Court of Appeals of New York in *Metropolitan Insurance Company v. Conway* has furnished *respondent* with a direct precedent in its favor (which we believe to be the case) any more than we are concerned with whether the Supreme Court of Nebraska, in a better reasoned opinion, in *State*

ex rel. Republic Nat. Life Ins. Co. v. Smrha, et al., 138 Neb. 484, 293 N. W. 372 (1940), has furnished *petitioner* with a direct precedent in its favor. (Which is likewise the case.) That with which we are concerned is whether the Courts of Delaware would adopt the principle of incontestability as stated by this court in the *Patryas* case, or the one stated by the New York Court in the *Conway* case. The latter carries us directly into the anomaly that statutes, substantially different, are, nevertheless, the same, and that statutes deliberately amended have, nevertheless, remained unchanged. The principle, as stated by this court in the *Patryas* case, leads to no such anomaly, but, on the contrary, shows the purpose which underlies incontestable statutes. We are clear that the Courts of Delaware would adhere to the principle stated by this Court that incontestability provisions inserted in policies under statutory compulsion really mean incontestability, and that they would not follow the New York Court in its view that the statutory requirement means very little when a contest is made.

The decision of this Court in *Erie Railroad Co. v. Tompkins,* 304 U. S. 64 (1938), requires the Federal Courts in diversity cases to follow State Law as this has been announced by the courts of the states where they sit. This accomplishes the desirable result that, within the boundaries of a state, two different laws shall not prevail, the one as announced by the state's own courts, and the other as announced by Federal courts within the state. It prevents the Federal Court's adoption of its own views upon the law in general when this is contrary to the law as announced by the courts of the state. Where, however, there is no law announced by the state courts, that which is frequently the case in a small state like Delaware whose jurisprudence is not as extensive as that of the larger states, the Federal courts are compelled to resort to the general law for ascertainment as to what, in their opinion, the state courts would determine the state law to be in the light of the general

law. This does not mean, however, that the decisions of this Court in matters of general law shall not be regarded in cases in which Federal courts, sitting within a state, are attempting to evolve the law of the state, where its own courts have not spoken. Conceivably, in such a case, the decisions of this Court are not binding upon the lower Federal courts, although we know of no holdings to this effect. We believe, however, that there is nothing in the decisions of this Court which compels a lower Federal court, sitting within a state, to accept the authority of the decisions of another state in preference to that of the decisions of this Court. Certainly this must be so in a case such as the present one, where the decisions of this Court are to the effect that incontestability means incontestability, and the decisions of the courts of other states, accepted by lower Federal Courts, are that incontestability means something quite short of this; and this is especially so, when those decisions lead to results as anomalous as those in the present case.

The Interpretation Question.

The policies in suit were issued in June 1935 when the assured, Richard duPont, was barely 24 years old. He was a pioneer in the field of glider aviation and at the time when the insurance was effected his pre-eminence in that field was acknowledged (45a). The world was enjoying a period of peace; it was more than four years before the outbreak of the second World War, and more than six years before American participation in it. That the assured even then foresaw the potentialities for the use of gliders in warfare is shown by the Record (48a).[12] His foresight in this was amply demonstrated in the course of World War *II*, and his own critical part in the development and effectuation of this arm of war is shown in Exhibit B (a) to B

12. "* * * he has been in hopes that some day the Navy, the Army, or some patriotic organization would give them an order large enough to enable him to get his relatives to put some capital into the business for him." (Letter which was before insurer's Home Office underwriter when policies were issued.)

(1) and Exhibit C (57a-114a). It is unthinkable that a young American in his situation would have intended, by entering into insurance contracts in 1935, to deprive his country of the value of the special experience which he had acquired and which he was to acquire in the years to come, or to put himself into the situation where a conflict between his duty to his country and his responsibility to his children might result. If this could be doubted, the course of the remaining years of the assured's short career effectually dissipates that doubt.

This Court has appreciated the place in the making of an insurance contract of the understanding and the intention of the assured, no less than that of the insurer.[13]

In the record in this case, however, resort need not be had alone to inference as to what the intention of the assured must have been, for it is plain upon the record that the insurer held the very intention which, through force of circumstances, we can only infer to have been that of the assured. War service exceptions from incontestability were at that time old. They antedated by a long period that exception in the Delaware Statute under which the policies in suit were issued. It had been the unvaried practice of respondent to waive the protection of the war service exception to incontestability during times of peace. It was only in war that it relied upon its right to invoke the exception.

Before World War *I* it did not write the war service exception into its policies; during that war it did; following that war it omitted the exception; during World War *II* it resumed the writing of the war service exception, but to a limited extent only (51a-53a). Since the policies in suit were written in 1935, in time of peace, no exception to incontestability for war service was contained in them, although the Delaware statute expressly permitted this. Respondent's standard policy *for the year 1943*, the year in

13. "It seems to us that that would be the natural interpretation of the words by the people to whom they are addressed, and that the language of each policy makes the company issuing it liable in the event that happened." Northwestern Life Ins. Co. v. Johnson, 254 U. S. 96 (1920) (speaking of the intention to be gathered by an assured as to the meaning of incontestability.)

which the assured died, demonstrates quite clearly that its peacetime policies, even where an aviation exclusion clause was inserted, were not intended to exclude *any* war risk. Significantly, the 1943 standard policy, issued when the war was at its height, would not have excluded from coverage the death of the assured in this case, had he effected his insurance in 1943, instead of in 1935. Respondent, acutely alive to the risks involved in the issuance of policies during the war, made a careful analysis of those which it could with safety undertake, and those which it felt that it could not undertake. Thus the 1943 policy warned its assureds in this wise, by red bold-face type upon the face of the policy.

> **"READ YOUR POLICY CAREFULLY, CERTAIN WAR, AVIATION AND SUICIDE RISKS ARE NOT ASSUMED. IN CASE OF ANY DOUBT WRITE YOUR COMPANY FOR FURTHER EXPLANATION." (53a)**

The "CERTAIN" war and aviation risks which were "NOT ASSUMED" were these

> "Death of the Insured occurring under any of the following conditions is a risk not assumed under this Policy:
>
> (a) Outside the forty-eight states of the United States, the District of Columbia, Canada, and Newfoundland (termed the Home Area) while the Insured is in the military or naval forces (including air forces) of any country at war, declared or undeclared.
>
> (b) Inside the Home Area as a result of service outside the Home Area in the military or naval forces (including air forces) of any country at war, declared or undeclared, provided death occurs within six months after returning to the Home Area.
>
> • • •
>
> (d) As a result of operating, riding in, or descending from, any kind of aircraft, except riding as a

fare-paying passenger (including a passenger traveling solely as such on a pass) in a licensed passenger aircraft provided by an incorporated passenger carrier on a scheduled passenger air service regularly offered over an established passenger route." (52a-53a)

It will be noted that the clause (d) is, in different verbiage, precisely the aviation exclusion clause of the 1935 policies in suit. The clauses (a) and (b) contain the *war* risks which are not assumed. They include specifically, and as if to emphasize this parenthetically, death resulting from air casualty. Since there could be no death from air casualty in the paragraphs (a) and (b), which would not fall within the literal exclusion terms of paragraph (d), it must be obvious that paragraph (d), the very exclusion provision of the policies in suit, intended to refer to casualties from civilian aviation alone. Otherwise there could have been no point in the specific reference "(including air forces)" in paragraphs (a) and (b). If the word "obvious" is too strong a one, although we do not think it is, by plain inference paragraph (d) must have referred to civilian aviation alone. The war death of the assured in the present case, however, is not excluded from coverage by paragraphs (a) and (b), and these paragraphs (together with a paragraph "(c)" which is irrelevant for present purposes) contained the only war casualty exclusions in the policy. The only "Home Area" exclusion is for death in the "Home Area" as a result of casualty occurring *outside* the "Home Area," and that within six months of the time when the casualty occurred. Both the casualty and the death of Richard duPont occurred within the "Home Area", and his death, had he been insured under the standard 1943 *war* policy, would not have been excluded from coverage. In such a situation, it is fantastical to suggest that the death of the assured in this case would have been covered, not excluded, had he entered into the insurance

contract in 1943, in the midst of war, when respondent had carefully studied the question of which war risks it was willing to assume, and which it was unwilling to assume, and that his death was not covered in 1935 at a time when, by admission, respondent was totally uninterested in war risks *of any kind.*

This argument, although earnestly made both in brief and oral argument, was not dealt with below.

In the Petition for Rehearing reference is made to the places in the brief and in the transcript of the oral argument where the foregoing argument was made (152-3). Again, as in the matter of the argument on the differences between the Statutes, the Petition for Rehearing was filed in great measure in order to ask for a consideration of this argument; and again, it must be said that the denial of the Petition imposes upon the jurisprudence of the State of Delaware a decision upon the interpretation of insurance contracts which cannot be supported in reason.

In the situation of today, where the courts of the states are daily dealing with the mass of policies which were issued in time of peace, in which death resulted from war, where such death might fall within the literal words of exclusion of the policies, but where compelling arguments can be made that no war exclusion was intended, a Federal Court, sitting within a state, should not be permitted, in a case like the present one, where the evidence is as clear as it is that *no* war risk was intended to be excluded, to engraft on the jurisprudence of the state a decision that the intention of the parties must be subordinated to literal words of exclusion which may be found in the policy. When, as has been shown, the Federal Court decision is tantamount to a prevention of review or correction by the state courts, that decision, it is submitted, should receive the consideration of this court in order that it may be assured that the decision below is correct.

CONCLUSION.

It is submitted that the Writ of Certiorari should issue.

Respectfully submitted,

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ADDENDUM.

(Included for the convenience of the Court.)

The 48 states and the District of Columbia may be classified in three divisions,—(1st) jurisdictions having no incontestable statutes; (2nd) jurisdictions having incontestable statutes in which aviation risks are not excepted; and (3rd) jurisdictions having incontestable statutes which permit the exclusion of aviation or other special risks. So classified the jurisdictions are grouped as follows:

(1)
- Arkansas
- Connecticut
- Florida
- Georgia
- Kentucky
- Louisiana
- Mississippi
- Missouri
- Montana
- Nevada
- Rhode Island
- South Carolina
- Vermont
- West Virginia
- Wisconsin

(2)
- Alabama
- Arizona
- California
- Delaware
- Idaho
- Indiana
- Iowa
- Maine
- Maryland
- Massachusetts
- New Hampshire
- North Carolina
- North Dakota
- Pennsylvania
- Tennessee
- Texas
- Virginia
- Washington
- Wyoming

(3)
- Colorado
- District of Columbia
- Illinois
- Kansas
- Ohio
- Oklahoma
- Oregon
- Michigan
- Minnesota
- Nebraska
- New Jersey
- New Mexico
- New York
- South Dakota
- Utah

Listed alphabetically with corresponding reference to the numbers of classification they are as follows:

Alabama (2)
Arizona (2)
Arkansas (1)
California (2)
Colorado (3)
Connecticut (1)
Delaware (2)
District of Columbia (3)
Florida (1)
Georgia (1)
Idaho (2)
Illinois (3)
Indiana (2)
Iowa (2)
Kansas (3)
Kentucky (1)
Louisiana (1)
Maine (2)
Maryland (2)
Massachusetts (2)
Michigan (3)
Minnesota (3)
Mississippi (1)
Missouri (1)
Montana (1)
Nebraska (3)
Nevada (1)
New Hampshire (2)
New Jersey (3)
New Mexico (3)
New York (3)
North Carolina (2)
North Dakota (2)
Ohio (3)
Oklahoma (3)
Oregon (3)
Pennsylvania (2)
Rhode Island (1)
South Carolina (1)
South Dakota (3)
Tennessee (2)
Texas (2)
Utah (3)
Vermont (1)
Virginia (2)
Washington (2)
West Virginia (1)
Wisconsin (1)
Wyoming (2)

The incontestable provisions of the various jurisdictions are listed for convenience in alphabetical order as follows:

Alabama.

The incontestability statute relates to fraud or irregularities contained in the application. It reads in part as follows:

"No life insurance company shall contest a claim under any policy of insurance on the plea of fraud or irregularities in application after two annual premium payments have been made on policy, but must pay the full amount of policy within sixty days after proofs of death have been received. . . ."

Code of Alabama 1940, Title 28, Sec. 7 (8365) (4573) (2597).

ARIZONA.

The statutory incontestable clause which is a "mandatory provision" reads in part as follows:

". . . incontestable after not more than two [2] years from its date, except for non-payment of premiums and except for violation of the conditions of the policy relating to naval and military service in time of war; . . ."

Arizona Code Annotated 1939 (Bobbs-Merrill), 67-705; 3.

ARKANSAS.

No statute exists in this state requiring that policies contain an incontestable clause.

CALIFORNIA.

Except for statutes relating to group insurance and to Mutual Life and Disability Insurance on a stipulated premium plan, with provision for assessments, there are no statutes requiring that policies contain an incontestable clause. The statute applicable to group life policies provides in part as follows:

"The policy shall provide that it is incontestable after two years from its date of issue, except for non-

payment of premiums and except for violation of the conditions of the policy relating to military or naval service."

Deering's California Codes (1944), Sec. 10206.

COLORADO.

The statutory incontestable clause required as a policy provision reads in part as follows:

". . . incontestable after it shall have been in force during the lifetime of the insured for two years from its date, except for non-payment of premiums and except for violation of the conditions of the policy relating to naval and military service in time of war, or other prohibited risks, and at the option of the company provisions relative to benefits in the event of total and permanent disability and provisions which grant additional insurance specifically against death by accident may also be excepted."

1935 Colorado Statutes Annotated, Ch. 87, Sec. 57.

CONNECTICUT.

There is no statute requiring policies to contain an incontestable clause.

DELAWARE.

The statutory incontestable clause required as a policy provision reads in part as follows:

". . . incontestable after it has been in force during the lifetime of the insured for a period of not more than two years from its date, except for non-payment of premiums and except for violations of the conditions of the policy relating to naval or military service in time of war and, at the option of the company, provisions relative to benefits in the event of total and permanent disability and provisions which

grant additional insurance specifically against death by accident may also be excepted; . . ."

Revised Code of Delaware 1935, Ch. 20, Pgh. 496, Sec. 35.

DISTRICT OF COLUMBIA.

The statutory incontestable clause required as a policy provision reads in part as follows:

". . . incontestable after it has been in force during the lifetime of the insured for a period of not more than two years from its date, except for non-payment of premiums and except for violations of the conditions of the policy relating to naval or military service in time of war, and at the option of the company, provisions relative to benefits in the event of total and permanent disability and provisions which grant additional insurance specifically against death by accident may also be excepted; . . ."

District of Columbia Code 1940, Title 35, Sec. 35-703 [5:220b].

In 1934, the following statute was enacted:

"No policy of life insurance . . . shall be issued by a life insurance company organized under the laws of the District . . . if it contains any of the following provisions:

. . .

"(3) Except for provisions relating to misstatement of age, suicide, aviation, and military or naval service in time of war, a provision for any mode of settlement at maturity, after the expiration of the contestable period of the policy of less value than the amount insured on the face of the policy plus dividend additions, if any, less any indebtedness to the company on or secured by the policy, and less any premium that may, by the terms of the policy, be deducted."

Ibid, 35-704 (5:22c).

FLORIDA.

There is no statute requiring policies to contain an incontestable clause.

GEORGIA.

There is no statute requiring policies to contain an incontestable clause.

IDAHO.

The statutory incontestable clause required as a policy provision reads in part as follows:

". . . incontestable after it shall have been in force during the lifetime of the insured for two years from its date of issue, except for nonpayment of premiums, and except for violation of the conditions of the policy relating to military or naval service in time of war and at the option of the company provisions relative to benefits in the event of total and permanent disability and provisions which grant additional insurance specifically against death by accident may also be excepted."

Vol. 2 Idaho Code 1932, 40-1303, 2.

ILLINOIS.

The statutory incontestable clause required as a policy provision reads in part as follows:

". . . after it has been in force during the lifetime of the insured a specified time, not later than two years from its date, it shall be incontestable except for non-payment of premiums and except at the option of the company, with respect to provisions relative to benefits in the event of total and permanent disability, and provisions which grant additional insurance specifically against death by accident and except for violations of the conditions of the policy relating to naval or military service in time of war *or for violation of an express condition, if any, relating to aviation,* (*ex-*

cept riding as a fare-paying passenger of a commercial air line flying on regularly scheduled routes between definitely established airports) in which case the liability of the company shall be fixed at a definitely determined amount not less than the full reserve for the policy and any dividend additions;[11] provided that the application therefor need not be attached to or made a part of any policy containing a clause making the policy incontestable from date of issue."

11 Jones Illinois Statutes Annotated; 1944 Cumulative Supplement, 66.899 Sec. 224, (1), (c).

INDIANA.

The statutory incontestable clause required as a policy provision reads in part as follows:

". . . incontestable after it shall have been in force during the lifetime of the insured for two [2] years from its date, or, at the option of the company after it shall have been in force for two [2] years from its date, except for non-payment of premiums, and except for violation of the conditions of the policy relating to naval and military service in time of war, and at the option of the company provisions relative to benefits in the event of total and permanent disability and provisions which grant additional insurance specifically against death by accident may also be excepted."

8 Burns Indiana Statutes Annotated 1933 (1945 Cumulative Pocket Supplement), 39-4206, (3).

IOWA.

The statutory incontestable clause required as a policy provision reads in part as follows:

". . . incontestable after two years from its date of issue, except for nonpayment of premiums and ex-

11. Italics indicate amended portions of statutes.

cept for violation of the conditions of the policy relating to military or naval service in time of war."

Code of Iowa, 1939 Title XX, 8684.05, 1.

KANSAS.

The statutory incontestable clause required as a policy provision reads in part as follows:

". . . incontestable after it has been in force during the lifetime of the insured for a period of not more than two years from its date, except for non-payment of premiums and except for violations of the conditions, if any, relating to naval or military service in time of war *or to aeronautics* and, *except also* at the option of the company, with respect to provisions relative to benefits in the event of total and permanent disability and provisions which grant additional insurance specifically against death by accident *or by accidental means;* . . ."

1943 Supplement to General Statutes of Kansas 1935 (Corrick), 40-420, (2).

KENTUCKY.

No statutory requirement that policies contain an incontestable clause is contained in the law of this state.

LOUISIANA.

There is no statutory requirement that policies contain an incontestable clause.

MAINE.

The statutory incontestable clause required as a policy provision reads in part as follows:

". . . incontestable after it shall have been in force during the life time of the insured for 2 years from its date, except for non-payment of premiums and except for violations of the policy relating to the naval or military service in time of war and at the option

of the company provisions relative to benefits in the event of total and permanent disability and provisions which grant additional insurance specifically against death by accident may also be excepted."

Vol. 1 Revised Statutes of Maine 1944, Ch. 56, Sec. 140.

MARYLAND.

The statutory incontestable clause required as a policy provision in industrial life contracts reads in part as follows:

"(D) A provision that the policy shall be incontestable after it has been in force during the lifetime of the insured for a period of not more than two years from its date, except for non-payment of premiums and, at the option of the company, except for suicide, death incurred in the commission of a felony, violation of the conditions of the policy relating to military or naval service in time of war, and as to provisions relative to the benefits in the event of permanent and total disability and provisions which grant additional insurance specifically against death by accident."

Vol. 2 Annotated Code of Maryland (Flack) Art. 48A Sec. 128 (D).

MASSACHUSETTS.

The statutory incontestable clause required as a policy provision reads in part as follows:

". . . incontestable after it has been in force during the lifetime of the insured for a period of two years from its date of issue except for non-payment of premiums or violation of the conditions of the policy relating to military or naval service in time of war and except, if the company so elects, for the purpose of contesting claims for total and permanent disability bene-

fits or additional benefits specifically granted in case of death by accident."

Vol. 5. Annotated Laws of Massachusetts, Ch. 175, Sec. 132 (2).

MICHIGAN.

The Statutory incontestable clause required as a policy provision reads in part as follows:

". . . incontestable after it shall have been in force during the lifetime of the insured for two years from its date, except for nonpayment of premiums and except for violations of the policy relating to naval and military services in time of war, and at the option of the company provisions relative to benefits in the event of total and permanent disability and provisions which grant additional insurance specifically against death by accident may also be excepted;"

Vol. 17, Michigan Statutes Annotated. 1943, Chapter 242, Sec. 24.263 (3).

"Nothing contained in this subsection nor in subsection 3 of section 3 of this chapter relating to incontestability, shall be construed as prohibiting a life insurance company from placing in its policies provisions limiting its liability with respect to

(a) *Death resulting from aviation other than as a fare-paying passenger on a regularly scheduled route between definitely established airports;"*

Ibid., Sec. 24.263 (4).

MINNESOTA.

The statute relating to standard forms of policies reads in part as follows:

"FORMS—The following are established as standard forms in which policies of life insurance may be

issued and delivered in this state, and in which policies of life insurance of life insurance companies organized under the laws of this state may be issued.

"CONDITIONS—(The policy may here provide for restrictions of liability by reason of travel, occupation, change of residence and suicide. These restrictions, except such as refer to military and naval service in time of war, must be applicable only to cases where the act of the insured provided against occurs within two years after the issuance of the policy.)

"INCONTESTABILITY—This policy constitutes the entire contract between the parties and shall be incontestable from its date except for nonpayment of premiums and except as otherwise provided in this policy."

Vol. 1. Masons Minnesota Statutes, 1927, Ch. 19, Sec. 3399.

The statutory incontestable clause required as a policy provision reads in part as follows:

". . . incontestable after it shall have been in force during the life-time of the insured for two years from its date, except for non-payment of premiums and except for violations of the conditions of the policy relating to naval and military services in time of war and, at the option of the company, provisions relative to benefits in the event of total and permanent disability and provisions which grant additional insurance specifically against death by accident, may also be excepted. A special form of policy, however, may be issued on the life of a person employed in an occupation classed by the company as extra hazardous or as leading to hazardous employment, which shall provide that service in certain designated occupations may reduce the company's liability under the policy to a certain designated amount not less than the full policy reserve."

Ibid: Sec. 3402 (3).

MISSISSIPPI.

There is no statutory requirement that policies contain an incontestable clause.

MISSOURI.

There is no statutory requirement that policies contain an incontestable clause.

MONTANA.

There is no statutory requirement that policies contain an incontestable clause.

NEBRASKA.

The statutory incontestable clause required as a policy provision reads in part as follows:

". . . incontestable after it shall have been in force during the lifetime of the insured for two years from its date, except for nonpayment of premiums and except with respect to limitations of liability which may be contained in the policy relating to (a) service in the military, naval or air forces of any country at war, declared or undeclared, and (b) *aeronautics other than as a fare-paying passenger of a commercial airline, and flying on a regularly scheduled route between definitely established airports; and in any such cases the liability of the company may be limited by the terms of the policy to a sum not less than the reserve on the face of the policy and the reserve on any paid-up additions thereto and any dividends standing to the credit of the policy, less any indebtedness to the company on the policy;* and, at the option of the company provisions relative to benefits in the event of total and permanent disability, and provisions which grant additional insurance specifically against death by accident, may be excepted from the incontestable clause; *Provided,*

limitations, with reference to aeronautics shall not be included in any policy where an extra premium is charged to cover the aeronautic risk, nor shall any such limitations extending beyond the contestable period be included in or attached to any policy where the applicant for insurance has not elected in writing to accept a policy with such limitations, and by such election has agreed to a reduced coverage for the aviation risk."

Vol. 3. Revised Statutes of Nebraska, 1943, Sec. 44-502 (5).

NEVADA.

There is no statute requiring that policies contain an incontestable clause.

NEW HAMPSHIRE.

The statutory incontestable clause required as a policy provision reads in part as follows:

". . . incontestable after it shall have been in force during the lifetime of the insured for two years from its date, except for non-payment of premiums, and except for violations of the policy relating to the naval or military service in time of war."

Vol. 2. Revised Laws of New Hampshire, 1942, Ch. 327, (10).

NEW JERSEY.

The statutory incontestable clause required as a policy provision reads in part as follows:

". . . incontestable, except for non-payment of premiums and for violation of its express conditions, if any, relating to hazardous travel, residence or occupation, in which case the liability of the company may be limited to a definitely determinable reduced amount, which shall not be less than the full reserve for the

policy and any dividend additions, and except also, at the option of the company, with respect to provisions relative to benefits in the event of total and permanent disability, and provisions which grant additional insurance specifically against death by accident.

"A company may issue a special form of policy on the life of a person employed in an occupation or residing in a location classed by the company as hazardous or as liable to lead to hazardous employment or residence, which may provide that service in certain designated occupations or residence in certain designated localities shall reduce the company's liability under the policy to a definitely determinable amount not less than the full reserve for the policy and any dividend additions."

Vol. 1. New Jersey Revised Statutes 1937, Title 17, Art. 5, 17:34-15 (c).

NEW MEXICO.

The statutory incontestable clause required as a policy provision reads in part as follows:

". . . incontestable after it has remained in force during the lifetime of the insured for a period of not less than one [1] or more than [2] years from its date, or date of any reinstatement thereof, except for nonpayment of premiums, or violation of the conditions of the policy relating to military or naval service in time of war, aviation or marine employment. This provision, however, shall not apply to any special benefits contained in any life insurance policy which are contingent upon the disability of the nsured, or contingent upon death occurring by accident, or in any special manner."

Vol. 5. New Mexico Statutes 1941, Annotated, Sec. 60-601 (3).

NEW YORK.

The statutory incontestable clause required as a policy provision reads in part as follows:

". . . incontestable after it has been in force during the life time of the insured for a period of two years from its date of issue, except for nonpayment of premiums and except for violation of the conditions of the policy relating to military or naval service; and at the option of the insurer, provisions relating to benefits in the event of total and permanent disability, and provisions which grant additional insurance specifically against death by accident or accidental means, may also be excepted."

"2. No policy of life insurance issued or delivered in this state shall contain any provision which excludes liability for death caused in a certain specified manner except as follows:

• • •

"(c) *A clause excluding from the coverage death resulting from aviation under conditions specified in the policy.*"

Book 27, McKinney's Consolidated Laws of New York Annotated, Sec. 155.

NORTH CAROLINA.

There is no incontestability statute relating to general life policies. With respect to group life insurance the statute provides in part as follows:

(a) "A provision that the policy shall be incontestable after two years from its date of issue, except for nonpayment of premium and except for violation

of the conditions of the policy relating to military or naval service in time of war."

1945 Session Laws of North Carolina page 437 § 58-211.

NORTH DAKOTA.

The statutoy provision relating to incontestability in the standard form of Ordinary Life or Limited Payment Life Policies reads in part as follows:

"Conditions. (The policy may here provide for restrictions of liability by reason of travel, occupation, change of residence, and suicide. These restrictions, except such as refer to military and naval service in time of war, must be applicable only to cases where the act of the insured provided against occurs within one year after the issuance of the policy in the case of suicide and within two years in all other cases.)

"Incontestability. This policy constitutes the entire contract between the parties and shall be incontestable from its date, except for nonpayments of premiums and except as otherwise provided in this policy."

Vol. 2. North Dakota Revised Code, 1943, Title 26, 26-0326.

The statutory provision of incontestability required in policies other than the Standard form reads in part as follows:

"3. A provision that the policy shall constitute the entire contract between the parties and shall be incontestable after it shall have been in force during the lifetime of the insured for two years from its date, except for nonpayment of premiums and except for violations of the policy relating to naval or military service in time of war, and, at the option of the company, provisions relative to benefits in the event of

total and permanent disability and provisions which grant additional insurance specifically against death by accident also may be excepted."

Ibid: Sec. 26-0335, 3.

OHIO.

The statutory incontestable provisions required in the Standard Life Insurance Policy reads in part as follows:

"CONDITIONS.—(The policy may here provide for restrictions of liability by reason of travel, occupation, change of residence and suicide. These restrictions except such as refer to military and naval service in time of war, must be applicable only to cases where the act of the insured provided against occurs within two years after the issuance of the policy.)

"INCONTESTABILITY.—This policy and the application therefor, a copy of which is endorsed hereon, constitute the entire contract between the parties and shall be incontestable from its date, except for non-payment of premiums and except as otherwise provided in this policy. All statements made by the insured in said application shall, in the absence of fraud, be deemed representations and not warranties."

Vol. 6. Page's Ohio General Code Annotated, Sec. 9412.

The incontestability statute relating to policies other than Standard Policies provides in part as follows:

"(3) A provision that the policy and the application therefor, a copy of which must be endorsed thereon, shall constitute the entire contract between the parties and shall be incontestable after it has been in force during the lifetime of the insured for a period of not more than two years from its date, except for non-payment of premiums and except for violations of the conditions, if any, relating to naval or military service

in time of war *or to aeronautics* and, except also, at the option of the company, with respect to provisions relative to benefits in the event of total and permanent disability and provisions which grant additional insurance specifically against death by accident or by accidental means."

1945 Ohio General Code Supplement to Vol. 6, Sec. 9420, (3), pp. 81, 82.

OKLAHOMA.

The statute requiring that policies contain an incontestable clause reads in part as follows:

". . . incontestable after two (2) years from its date, except for non-payment of premiums, and except all violations of the conditions of the policy relating to the naval or military service in time of war, *and except for violation of the conditions of the policy relating to service, travel or flight in any species of aircraft, other than as a fare paying passenger in a licensed passenger aircraft piloted by a licensed passenger pilot on a regular passenger route between definitely established air ports.*"

Vol. 1. Oklahoma Statutes 1941, Sec. 218, Third.

OREGON.

The statute requiring that policies contain an incontestable clause reads in part as follows:

". . . incontestable after it shall have been in force for two years during the lifetime of the insured, except for nonpayment of premiums and except for violations of the conditions of the policy relating to naval, military or aerial service in time of war; provided, however, that at the option of the company the two year limit within which the policy may be contested shall not apply to the provisions for benefits in the event of total and permanent disability and pro-

visions which grant additional insurance specifically against death by accident; that all statements made by the insured shall, in the absence of fraud, be deemed representations and not warranties; and that no such statement or statements shall be used in defense of a claim under the policy unless contained in a written application and unless a copy of such statement or statements be indorsed upon or attached to the policy when issued."

Vol. 7. Oregon Compiled Laws Annotated, Sec. 101-506, (c).

PENNSYLVANIA.

The statutory provision requiring that policies contain an incontestable clause reads in part as follows:

"(c) A provision that the policy shall be incontestable after it has been in force, during the life time of the insured, two years from its date of issue, except for nonpayment of premiums, and for engaging in military or naval service in time of war without the consent in writing of an executive officer of the company; and that at the option of the company, provisions relative to benefits in the event of total and permanent disability, and provisions which grant additional insurance specifically against death by accident, may also be excepted."

Purdon's Pennsylvania Statutes, Title 40, Sec. 510, (c) as amended by Sec. 1, 1944 Cumulative Supplement p. 83.

RHODE ISLAND.

There is no statute requiring policies to contain an incontestable clause.

SOUTH CAROLINA.

There is no statute requiring policies to contain an incontestable clause.

SOUTH DAKOTA.

The statutory provision relating to incontestability in the Standard Life Policy reads in part as follows:

"Conditions. (The policy may here provide for restrictions of liability by reason of travel, occupation, change of residence and suicide. These restrictions, except such as refer to military and naval service in time of war, must be applicable only to cases where the act of the insured provided against occurs within two years after the issuance of the policy.)

"Incontestability. This policy constitutes the entire contract between the parties and shall be incontestable from its date except for nonpayment of premiums and except as otherwise provided in this policy."

Vol. 1. South Dakota Code of 1939, Title 31, Insurance, Sec. 31, 1601, (4).

The incontestability statute required in policies other than standard forms reads in part as follows:

". . . incontestable after it shall have been in force during the life time of the insured for two years from its date, except for nonpayment of premiums; but at the option of the company provisions relative to benefits in the event of total and permanent disability and provisions which grant additional insurance specifically against death by accident may be excepted."

Ibid: Sec. 31, 1609, (3).

TENNESSEE.

The statutory incontestability clause required in life policies reads as follows:

"(3) *Policy is entire contract, and is incontestable after two years; exceptions.*—A provision that the policy shall constitute the entire contract between the parties, and shall be incontestable after two years from its

date, except for nonpayment of premiums and except for violations of the conditions of the policy relating to naval and military services in time of war."

Vol. 4. Williams Tennessee Code Annotated 1934, Chapter 6 Sec. 6179 (3).

TEXAS.

The statutory provision relating to incontestability in the standard form of Ordinary Life or Limited Payment Life Policies reads in part as follows:

"3. The the policy, or policy and application, shall constitute the entire contract between the parties and shall be incontestable not later than two years from its date, except for nonpayment of premiums; and which provision may or may not, at the option of the company, contain an exception for violations of the conditions of the policy relating to naval and military services in time of war."

Vol. 14. Vernon's Texas Civil Statutes, Title 78, Insurance (3).

UTAH.

The statutory provision relating to incontestability in the standard form of Ordinary Life or Limited Payment Life Policies reads in part as follows:

"(3) A provision that the policy shall be incontestable after it shall have been in force during the lifetime of the insured for a period of two years from its date, except for nonpayment of premiums and except for violations of the conditions of the policy relating to naval or military service in time of war or other prohibited risks."

Vol. 3. Utah Code Annotated 1943, Sec. 43-3-24, (3).

VERMONT.

There is no statute requiring that policies contain an incontestability clause.

VIRGINIA.

The statutory provision relating to incontestability in the standard form of Ordinary Life or Limited Payment Life Policies reads in part as follows:

". . . incontestable after it has been in force during the lifetime of the insured for a period of not more than one year from its date, except for non-payment of premiums and except for violation of the conditions of the policy relating to naval or military service in time of war and, at the option of the company, provisions relative to benefits in the event of total and permanent disability and provisions which grant additional insurance specifically against death by accident may also be excepted."

Virginia Code of 1942, Annotated Title 38, Chapter 169 Sec. 4251 c., Third.

WASHINGTON.

The statute relating to standard forms of policies reads in part as follows:

". . . incontestable after two years from its date of issue except for nonpayment of premiums, and except for violation of the conditions of the policy relating to military or naval service in time of war."

Vol. 8. Remington's Revised Statutes of Washington, Annotated, Sec. 7230, (2).

WEST VIRGINIA.

There is no statute requiring that policies contain an incontestable clause.

WISCONSIN.

There is no statute requiring that policies contain an incontestable clause.

WYOMING.

The statute relating to standard forms of policies reads in part as follows:

> ". . . incontestable after two years from its date or date of reinstatement, except for non-payment of premiums and except for violations of the conditions of the policy relating to naval and military service in time of war and, at the option of the company, provisions relative to benefits in the event of total and permanent disability and provisions which grant additional insurance specifically against death by accident may also be excepted."
>
> Wyoming Revised Statutes 1931, Sec. 54-232, Third.

WAR SERVICE CLAUSE CASES IN THE SECOND, THIRD AND FOURTH DECENNIALS OF AMERICAN DIGEST SYSTEM.

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87 Okla. 42, 208 Pac. 271 (1922);

Benham v. American Central Life Ins. Co.,
140 Ark. 612, 217 S. W. 462 (1920);

Boatwright v. American Life Ins. Co.,
191 Iowa 253, 180 N. W. 321 (1920);

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107 Kan. 681, 193 Pac. 382;

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Huntington v. Fraternal Reserve Assn.,
173 Wis. 582, 181 N. W. 819;

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88 Okla. 133, 211 Pac. 508;

Johnson v. Mutual Life Ins. Co.,
154 Ga. 653, 115 S. E. 14;

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169 Wis. 274, 172 N. W. 152;

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110 Kan. 455, 204 Pac. 530 (1922);
118 Kan. 35, 234 Pac. 50 (1925);

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221 Ill. App. 648 (1921);
Mattox v. New England Mutual Life Ins. Co.,
25 Ga. App. 311, 103 S. E. 180 (1920);
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115 S. C. 411, 106 S. E. 32 (1921);
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138 Ark. 442, 212 S. W. 310 (1919);
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43 N. D. 631, 175 N. W. 631 (1919);
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88 W. Va. 563, 107 S. E. 177 (1921);
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142 Ark. 29, 218 S. W. 675 (1920);
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204 Mo. App. 643, 218 S. W. 957 (1920);
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109 Wash. 338, 186 Pac. 1069 (1920);
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223 S. W. 819 (Mo. App. 1920);
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114 Kan. 315, 219 Pac. 514 (1923);
Stephan v. Prairie Life Ins. Co.,
113 Neb. 469, 203 N. W. 626 (1925);
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194 Iowa 7, 188 N. W. 677 (1922);
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151 Ark. 596, 237 S. W. 89 (1922).

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949

No. 619

WILMINGTON TRUST COMPANY, a Banking Institution Organized and Existing Under the Laws of the State of Delaware, Executor Under the Last Will and Testament of RICHARD C. duPONT, Deceased

v.

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, a Corporation of the State of New York

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF FOR THE RESPONDENT IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1949. No. 619.

Wilmington Trust Company, a Banking Institution Organized and Existing Under the Laws of the State of Delaware, Executor Under the Last Will and Testament of Richard C. duPont, Deceased,

v.

The Mutual Life Insurance Company of New York, a Corporation of the State of New York.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF FOR THE RESPONDENT IN OPPOSITION.

OPINIONS BELOW.

The opinions of the United States District Court for the District of Delaware are reported in 68 F. Supp. 83, and 76 F. Supp. 560 and appear in the Record at page 33a and page 118a (as amended, at page 127a). The opinion of the United States Court of Appeals for the Third Circuit is reported in 177 F. (2d) 404, and appears in the Record at page 135.

JURISDICTION.

The jurisdiction of this Court is invoked under 28 U. S. C. 1254.

STATUTE INVOLVED.

The only statute involved is Section 496 of the Revised Code of Delaware 1935, the pertinent part of which is printed in the Petition for a Writ of Certiorari.

COUNTERSTATEMENT OF QUESTIONS PRESENTED.

I. The law of Delaware being applicable to each question presented and there being no direct precedents in that State, did the Third Circuit Court of Appeals and the District Court for Delaware err:

(1) *With respect to the construction of the Delaware Incontestable Statute—*

(*a*) in following the numerous Federal and State court decisions which sustain the right of life insurance companies to limit or define the extent to which the risk of death by aviation is assumed; and

(*b*) in applying to the case at bar the Delaware doctrine that it must be assumed that when the Delaware Legislature adopted the statute, it intended that it be given the same judicial construction which the same phraseology had already received in the other states.

(2) *With respect to Petitioner's argument that the risk of military flying had been assumed—*

(*a*) in holding that the absence in the policy of a war clause was irrelevant to the interpretation of the scope of the aviation rider; and

(*b*) in holding that the aviation rider must be interpreted in accordance with its terms, and, being clear and unambiguous, may not be rewritten.

II. With respect to jurisdiction, whether this Court will review the decision of a Court of Appeals where—

(*a*) there is no conflict with the decision of another Circuit Court of Appeals;

(*b*) there is no probability of conflict with applicable local decisions;

(*c*) there is no Federal question involved;

(*d*) there is no claim of departure from the accepted and usual course of judicial proceedings; and

(*e*) the decision merely follows numerous similar decisions of other Circuit, District and State Courts.

STATEMENT.

The policies in suit were issued in 1935 and the following facts were known to and considered by Mutual Life before it wrote the aviation exclusion clause into the policies.

The late Richard C. duPont was a licensed pilot who owned and flew his own plane. During the three years immediately preceding the application for the policies he had flown some ninety thousand miles and spent some nine hundred hours in the air (55a). He was not only a famed glider expert, but had competed in soaring meets, was the holder of world records for sustained glider flight, and was in the business of manufacturing and selling sail planes or gliders (45a).

With knowledge of this background, Mutual Life included in the policies the usual and customary form of aviation clause (quoted in the Petition at Page 3), which (in effect) gave duPont full coverage only while flying in a regular commercial airliner and limited the Company's risk to the reserve on the policy if death should result from operating or riding in any other kind

of aircraft. Before doing so, it procured a letter from duPont stating that he understood and agreed that the aviation rider would be included in the policies (115a).

In April, 1943, duPont was appointed "Special Civilian Assistant" to General Arnold of the Army Air Forces, and was placed in charge of the Army's glider program (60a). He was never enlisted or commissioned in the military service. On the contrary, he was employed and served as a civilian technical and professional specialist pursuant to Section 8 of the Military Appropriations Act (67a).

In September, 1943, duPont was killed in a crash of a civilian-owned glider which was being tested for possible military use and in which he was riding as an observer (47a). Following his death Mutual Life paid the amount of the reserve on the policies, amounting to approximately $48,500.00, and the Petitioner brought suit claiming the balance of about $51,500.00, contending, first, that the Delaware Incontestable Statute nullified the aviation rider and second, that the aviation exclusion clause was not intended to cover "military flying".

ARGUMENT.

I. The Delaware Incontestable Statute Does Not Nullify the Aviation Rider.

A. *Mutual Life is Not Contesting the Policies. It Merely Seeks to Enforce Them in Accordance with Their Terms.*

The fundamental and simple first question involved in this case is whether a state life insurance statute prohibiting contests of a policy (except for reasons specified in the statute) after a period of two years from date of issue, precludes an insurer from limiting its coverage to the policy reserves if death results from riding in certain types of aircraft. Conversely, the question is whether

an Incontestable Statute nullifies a clearly expressed agreement between the insurer and the insured that the risk of death resulting from flying in private, unlicensed, or experimental aircraft is not assumed beyond the policy reserve.

There is nothing novel or unusual about this case. Aviation exclusion clauses similar to the one written into the duPont policies are a customary and usual limitation upon coverage and have been and are being written by life insurance companies throughout the United States. The question whether such limitations conflict with the purpose and intent of the Incontestable Statutes has been before State and Federal courts many times. These cases hold that the purpose of the Incontestable Statute is to assure a policy holder after a period of time that the *validity* of the policy will not be attacked by virtue of some real or alleged misrepresentation in the application or by reason of some other claim for forfeiture. See, for example, *Equitable Life Assurance Society* v. *Deem*, 91 F. (2d) 569, 571 (C. C. A. 4th 1937); *Jolley* v. *Jefferson Standard Life*, 199 N. C. 269, 154 S. E. 400 (1930); and *Reed* v. *Home State Life Ins. Co.*, 186 Okla. 226, 97 P. (2d) 53 (1934).

Virtually all of the numerous cases which have construed Incontestable statutes similar to the Delaware Statute have held that such statutes relate to and prohibit attacks upon the validity of the policy and do not preclude limitations upon or require the assumption of unduly hazardous risks of death.

The leading case in this field is *Metropolitan Life* v. *Conway*, 252 N. Y. 449, 169 N. E. 642 (1930). Justice Cardozo, who was then sitting upon the New York Court of Appeals, wrote the unanimous opinion of the Court. The basic question involved was identical with the point under discussion in this case and the Court construed the New York Incontestable Statute upon which the Delaware Statute here involved was later modeled. Justice Cardozo said:

"The provision that a policy shall be incontestible after it has been in force during the lifetime of the insured for a period of two years is not a mandate as to coverage, a definition of the hazards to be borne by the insurer. It means only this, that within the limits of the coverage, the policy shall stand, unaffected by any defense that it was invalid in its inception, or thereafter became invalid by reason of a condition. Like questions have arisen in other jurisdictions and in other courts of this State. There has been general concurrence with reference to the answer. • • •

"The meaning of the statute in that regard is not changed by its exceptions. A contest is prohibited in respect of the validity of a policy 'except for non-payment of premiums and except for violation of the conditions of the policy relating to military or naval service in time of war' (sec. 101, subd. 2). Here again we must distinguish between a denial of coverage and a defense of invalidity. Provisions are not unusual that an insured entering the military or naval service shall forfeit his insurance. A condition of that order is more than a limitation of the risk. In the event of violation, the policy, at the election of the Insurer, is avoided altogether, and this though the death is unrelated to the breach. No such result follows where there is a mere restriction as to coverage. The policy is still valid in respect of risks assumed."

Among the many decisions to the same effect are *Pacific Mutual Life Ins. Co. of California* v. *Fishback*, 17 P. (2d) 841, 171 Wash. 244 (1933); *Green* v. *Mutual Benefit Insurance Co.*, 144 Fed. (2d) 55 (C. C. A. 1st, 1944); *Head* v. *New York Life Ins. Co.* and *Head* v. *Hartford Accident & Indemnity Co.*, 43 F. (2d) 517 (C. C. A. 10, 1930); *McBride* v. *Prudential Insurance Co. of America*, 147 Ohio St. 461, 72 N. E. (2d) 98 (1947); *Rossman* v. *Metropolitan Life Ins. Co.*, 71 F. Supp 592 (D. Maine

1937); *Burns* v. *Mutual Benefit Life Ins. Co. of Newark*, 79 F. Supp. 847 (W. D. Mich. 1948).

The case relied upon by the Petitioner as being contra to the great weight of authority is *State ex rel. Republic National Life Ins. Co.* v. *Smrha*, 138 Neb. 484, 293 N. W. 372 (1940). This case was not only primarily decided upon a clause in the Nebraska statute not contained in the Delaware statute, but has become moot because the Nebraska legislature adopted a statute the following year specifically permitting aviation exclusions of the type before the Court in this case.

Our first point is that the Lower Courts in this case, in deciding how a Delaware Court would construe the Incontestable Statute of that State, came to the sensible and logical conclusion that Delaware would follow the virtually unanimous decisions which have crystallized Justice Cardozo's views as being the law of the land. Had Metropolitan Life *v.* Conway not been followed in this case, it is obvious that a chaotic situation would have arisen throughout the country.

As indicated above, it is general practice to limit the aviation risk assumed in a life policy when the insured has a history of private flying, and two other companies (the Travelers and Ætna companies), which issued policies to duPont at the same time, inserted a similar clause (24a).* The reason for this is self-evident. duPont was a famed glider pilot and would have been unable to obtain this insurance or any life insurance had he not been willing to accept policies in which the risk of hazardous flying was not assumed. Insurance premiums are based upon life expectancies under normal conditions and do not contemplate issuance of policies to persons exposed to unusual hazards.

Mutual Life is not contesting or attempting to nullify the policies in suit. It is merely resisting an attempt to

*These policies are in suit in the District Court of Delaware awaiting the outcome of this case.

collect a sum in excess of the amount which the parties had agreed would be paid in the event the insured should die as a result of operating or riding in a glider or any type of aircraft other than a commercial airliner.

B. *The Application by the Lower Courts of the Rule of Chicago Corporation v. Munds.*

While there is no state decision which construes the Delaware Incontestable Statute, the courts of that State hold that it must be assumed that when the Legislature adopts an act it intends that it be given the same judicial construction which the same phraseology has already received in other states.

The Delaware Statute was modeled upon and in all material respects contains precisely the same phraseology as the previously enacted New York Incontestable Statute. Prior to the adoption of the Statute in Delaware, Justice Cardozo had decided *Metropolitan Life Insurance Co.* v. *Conway, supra.*

In reaching the conclusion that the Delaware courts would follow Justice Cardozo's reasoning and construction, the learned District Judge and the President Judge of the Third Circuit Court of Appeals in their respective decisions applied the doctrine of *Chicago Corporation* v. *Munds,* 20 Del. Ch. 142, 172 Atl. 452 (1934). That case involved the construction of a statute which had been modeled upon a substantially identical New Jersey Act which, prior to its adoption in Delaware, had been construed by the New Jersey courts. Citing Sutherland on Statutory Constructions, the Delaware Court said (p. 148):

> "Where the terms of a statue which has received judicial construction are used in a later statute, whether passed by the legislature of the same state or county or by that of another, that construction is to be given to the later statute."

The same principle was subsequently announced and affirmed by the Delaware Supreme Court in *Koeppel* v. *duPont*, 38 Del. 542, 194 A. 847 (1937), and by the Delaware Superior Court in *In Re:* Denning, 61 A. (2d) 657 (1948).

The attention of the Court is respectfully called to the fact that the learned President Judge of the Third Circuit Court was himself a distinguished Delaware lawyer before his elevation to the Bench. His conclusion in this case that a Delaware Court would apply the doctrine thus thrice announced seems to us to be virtually conclusive of the first question involved in this case.

II. The Aviation Clause is Clear and Unambiguous and Precludes Recovery for More Than the Reserve on the Policies.

Petitioner's second question involves a simple question of the construction of a contract.

As has been pointed out above, duPont's death resulted from riding in an aircraft on a flight which did not meet any of the tests for the full coverage stipulated in the aviation rider.

Mutual Life respectfully submits that the language of the aviation exclusion clause is clear, concise and unambiguous. Its contract assumed fully the risk of death resulting from flights as a passenger in commercial airliners but did not assume the risk of death (beyond the policy reserve) resulting from flight in any other kind of aircraft regardless of the type or the capacity in which duPont might fly. It said with respect to *all* flights that "death as a result of operating or riding *in any kind of aircraft whether as a passenger or otherwise* (except as a fare paying passenger, etc.) is a risk not assumed under this policy". Manifestly these words furnish no support for, but an absolute contradiction of an argument that the exclusion refers only to death as a result of operating or riding in aircraft not engaged in military flight.

The District Court and the Third Circuit Court held that the language of the policy clearly excluded from full coverage a flight as a passenger in a military aircraft or an aircraft being prepared for use on a military purpose or mission. Furthermore, these Courts pointed out the tendency of the courts of Delaware to follow New York and Massachusetts decisions and concluded that the Supreme Court of that State would give much weight to *Durland* v. *New York Life Insurance Co.*, 186 Misc. 580, 61 N. Y. S. (2d) 700 (1946), decided by the Supreme Court of New York, and *Green* v. *Mutual Benefit Ins. Co., supra,* decided by the First Circuit Court of Appeals under Massachusetts law. Both of these cases held, under quite similar facts and policies, that the absence of a war clause did not render an aviation exclusion clause ambiguous or render the limitation upon coverage inapplicable when the insured was flying in a military plane or was flying under orders in military or naval service.

In relying upon the First Circuit decision in *Green* v. *Mutual Benefit Insurance Co.* as indicative of Massachusetts law, the learned Circuit Judge of the Third Circuit Court of Appeals overlooked the identical decision of the Supreme Court of Massachusetts in *Hyfer* v. *Metropolitan Life Insurance Co.*, 318 Mass. 175, 61 N. E. (2d) 3 (1945), cited in Respondent's brief in Circuit Court, pp. 39, 41-2.

In that case, as in the case at bar and the *Green* case, no war service conditions were included in the policy. The aviation clause was again similar to the duPont clause.

The insured enlisted in the Army after the policy was issued, was assigned to the air corps, and acted as radio operator on an army transport plane. On October 1, 1942, while "on a scheduled flight" in this plane in Porto Rico, where he was stationed, the insured and the entire crew were killed by crashing into a hilltop obscured by clouds. The beneficiary made the same contention with respect to the effect of the absence of a war service clause, as was advanced in the *Green* case and is advanced in the duPont

case. The Massachusetts Court, in affirming a decision by the trial court, likewise rejected the argument. According to the court (p. 178):

> "One reason urged by the plaintiff why it [the aviation clause] should not apply is that, since there was no general provision excluding an obligation to pay for death due to war risks, the aeronautical clause must be interpreted as not precluding payment for death occasioned by aircraft flight in the armed services. This, however, is in direct conflict with its express language. The absence of a provision excluding death due to war risks did not operate to engraft an implied exception upon the unambiguous aeronautical clause, which relates to the risk itself and not to the reason for the exposure. * * * It is fallacious reasoning to say that, because the policy failed to exclude liability for war losses in general, the scope of the undertaking, which clearly did exclude certain aviation deaths, is through such failure to be construed to comprehend all war losses and so to cover war aviation deaths of the excluded kind."

Other cases to the same effect are *Thoma* v. *New York Life Ins. Co.*, 30 North Co. R. (Pa.) 369 (1946); *Knouse* v. *Equitable Life Ins. Co. of Iowa*, 163 Kan. 213, 181 P. (2d) 314 (1940); *McKanna* v. *Continental Assurance Co.*, 165 Kan. 289, 194 P. (2d) 517 (1948); and *Burns* v. *The Mutual Benefit Life Ins. Co. of Newark, supra.*

Respondent respectfully submits that the Third Circuit and District Courts in this case could have come to no other conclusion but that Delaware would follow the decisions referred to above and hold the contract in suit clear and unambiguous.

We respectfully dispute the relevance of Petitioner's argument that if duPont had at some later date been issued a different form of policy his coverage as an insured would have been broader than under the policies in

suit. Furthermore, we dispute the assumption that the quoted but irrelevant 1943 form of Mutual Life's policy would have assumed the risk of death resulting from a glider accident. We make this assertion for two reasons. First, duPont was never in military service and was serving in a civilian capacity at the time of his death and second, the 1943 form of policy also excluded from coverage operating, riding in, or descending from, *any kind* of aircraft, whether as a passenger or otherwise, except as a fare paying passenger in a commercial airliner.

III. The Case at Bar is not Within the Purview of Supreme Court Rule 38 (5)(b) and the Petition Should be Denied.

It seems apparent to Respondent that this case does not possess any of the characteristics usually considered important by this Court when it grants a Petition for a Writ of Certiorari.

There is no Federal question involved, the decision is not in conflict with the decision of another Circuit Court of Appeals, and there is no claim of departure from the accepted and usual course of judicial proceedings. As it has been pointed out above, the decision in this case merely follows numerous similar decisions of other Circuit, District and State Courts.

Since there is no Delaware decision on all fours with this case, the decision in the Circuit Court is not in conflict with applicable local decisions. On the other hand, a contra decision by the Third Circuit would have been in conflict with (*a*) the Delaware doctrine of *Chicago Corp.* v. *Munds,* and (*b*) the tendency of the Delaware Courts to adhere to and follow decisions of the Courts of New York and Massachusetts.

The argument (Pet. pp. 6, 7) that the Supreme Court should exercise its discretionary jurisdiction because it is *unlikely* that the Delaware state courts will ever have occasion to pass upon the questions is a novel one as to

which no hint appears in any known authority. Even the factual basis of the argument (Pet. p. 7) consists of conjectural inferences from non-record facts, unnecessary here to argue.

When analyzed, petitioner's argument amounts to this: Where the federal court decides a question of state law, absent an applicable state decision, the Supreme Court should grant certiorari because the authority of the unreversed federal decision is such that there is little likelihood that the state court, if the question is ever presented, will ever reach a contrary conclusion. It is desirable, says Petitioner, that in such case, the Supreme Court and not the Circuit or the District Court should announce the state law.

We can only suggest that if this be a reason for the granting of certiorari, the Supreme Court will be taking unto itself the added vast and onerous burden of deciding state substantive law questions in nearly every federal case where the state court has not spoken on the subject.

Respectfully submitted,

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